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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 94

M. D. HOGGARD, INDIVIDUALLY, ETC., AND [illegible]
MOTOR EXPRESS, INC., PETITIONERS

vs.

J. C. CONEY, EARL C. [illegible], SAM C. [illegible]
ET AL., ETC.

[illegible]



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 94

M. D. HICKLIN, INDIVIDUALLY, ETC., AND BLALOCK MOTOR EXPRESS, INC., APPELLANTS,

vs.

J. C. CONEY, EARLE R. ELLERBE, SAM C. BLEASE, ET AL., ETC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

INDEX

	Original	Print
Proceedings in supreme court of South Carolina	1	1
Order to show cause	4	1
Petition	4	2
Return and answer	8	5
Demurrer to petition (omitted in printing)	9	
Notice of motion for order referring case to referee (omitted in printing)	10	
Order allowing filing of reply (omitted in printing)	12	
Reply	12	8
Affidavit of W. W. Goodman	16	10
Notice of motion to strike (omitted in printing)	18a	
Opinion, Stabler, J., and judgment	18b	13
Petition for appeal, assignments of error, and prayer for reversal	28	27
Order allowing appeal	39	30
Waiver of issuance of citation	43	32
Order dissolving injunction, etc.	45	33
Clerk's certificate (omitted in printing)	47	
Statement of points to be relied upon and stipulation as to printing record	48	35

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[fols. 1 & 2 & 3]

IN SUPREME COURT OF SOUTH CAROLINA IN THE ORIGINAL JURISDICTION

J. C. Coney, Earle R. Ellerbe, Sam C. Blease, J. H. Nance, Thomas H. Tatum, J. A. Beamguard, and B. J. Pearman, as Members of and Constituting the Railroad Commission of South Carolina, Petitioners,

against

M. D. Hicklin, Individually, and as a Representative of Class "B" Carriers Within the Provisions of Sections 8507-8530 of Chapter 162 of the South Carolina Code of 1932, Who are, or Claim to be, Engaged in Interstate Commerce, as Well as Intrastate Operations Within the State of South Carolina, Respondents

[fol. 4] Order to Show Cause

To the respondents above named:

Upon reading and considering the attached petition and upon motion of the attorneys for the said petitioners,

You are hereby

Ordered and directed to file your return to the petition above named in this Court, and serve a copy thereof upon the petitioners' attorneys, within twenty days from the date hereof, and further to show cause at the next session, regular or special, of the Supreme Court of South Carolina why the said motor transportation acts referred to in the petition should not be construed and enforced, and why you should not be enjoined and restrained from carrying on your said motor transportation business in the State of South Carolina except by compliance with the said acts and with the Rules and Orders of the Railroad Commission issued thereunder, and why the relief prayed for in the said petition should not be granted; and in the meantime pending the final determination of this case by this Court, the petitioners herein, their agents and servants, and all other persons, are hereby enjoined and restrained from, in any wise enforcing any of the Acts therein mentioned, or any of the Rules or Orders of the Railroad Com-

mission thereunder, or any of respondents' alleged liabilities thereunder, against the respondents herein.

John G. Stabler.

August, 1932.

IN SUPREME COURT OF SOUTH CAROLINA

PETITION

To the Supreme Court of South Carolina:

The petition of the above named petitioners respectfully shows to this Honorable Court:

1. That the petitioners above named, J. C. Coney, Earle R. Ellerbe, Sam C. Blease, J. H. Nance, Thomas H. Tatum, J. A. Beamguard and B. J. Pearman, constitute the Rail- [fol. 5] road Commission of South Carolina, and as such are charged with the duty among other things of enforcing the laws of the State of South Carolina regulating motor transportation, particularly the laws relating to motor bus and truck lines contained in Sections 8507-8530 of Chapter 162 of the South Carolina Code of 1932.

2. On information and belief that the respondent is now and has been for several years engaged in the business of motor transportation as a contract hauler of freight and property for compensation over the highways of the State of South Carolina, and is a resident and citizen of the State of South Carolina, with offices in the City of Columbia, in the State of South Carolina, and comes within the jurisdiction of the Railroad Commission; and that there are many other persons in like situation with the respondent, and that this suit is brought against the respondent as a representative of the class of contract carriers coming within Class "F" as defined by the terms of the said laws regulating motor transportation who are, or claim to be, engaged in Interstate Commerce, as well as intrastate operations within the State of South Carolina.

3. That the respondents come within Class "F" of Motor Vehicle Carriers, defined in the amendatory Act of April 7, 1930, as consisting of persons, firms or corporations proposing to engaged in the business known as contract haul-

ing of freight or property but not proposing to operate upon a regular schedule or over a regular route or to receive patronage along the route, and that as such the said respondents are required by said Act to obtain a certificate to operate and to pay the license fee therefor.

4. That the said respondents are now carrying on their motor transportation business in the State of South Carolina over the public highways without any certificate and without paying any of the fees or taxes therefor, and in violation of the said laws hereinabove mentioned and of the orders and rules of the Railroad Commission issued thereunder.

[fol. 6] 5. That as petitioners are informed and believe the respondents contend that the said Acts under which they are required to obtain the said certificates and pay the said fees and taxes are unconstitutional and void, particularly in that they purport in Section 2 of the Acts of 1925 (S. 8508 of the Code of 1932) to exempt from the operations thereof farmers and dairymen, hauling dairy and farm products, or lumber haulers engaged in transporting lumber and logs, in violation of the 14th Amendment and the due process clause, and also in that they constitute a burden upon respondents' interstate operations and hence are in violation of the Interstate Commerce clause of the United States Constitution, and that the said respondents have instituted a suit in the United States District Court for the Eastern District of South Carolina against these petitioners for the purpose of having the said Acts declared unconstitutional, and that the said suit is now pending in the said Court, and has not been brought to a final hearing, all of which will more fully appear by reference to the suit entitled M. D. Hicklin against J. C. Coney and others, defendants, reference to which is craved.

6. That as petitioners are advised and believe the said Acts hereinabove referred to are valid and constitutional; (a) that the proviso contained in Section 2 of the Acts of 1925 (S. 8508 of the Code of 1932) relating to farmers and dairymen and lumber haulers was and is mere surplusage, was intended in fact to exempt such persons only when they were hauling their own products and not engaged in transportation for hire, and that the said proviso has been

and is being so construed by the petitioners herein, but that if the said proviso should be for any reason construed as unconstitutional or invalid, then the said proviso should be stricken out of the said Acts and the said Acts declared valid and constitutional in all remaining terms thereof; and that the said acts have not been and are not being applied so as to discriminate against the respondents herein; (b) and that the said Acts were not intended to be construed [fol. 7] and have not been construed by petitioners herein to interfere with any of respondents' rights under the Interstate Commerce Clause of the United States Constitution.

7. That this action is brought for the purpose of enforcing the said Acts hereinabove referred to, to wit, Sections 8507 through 8530 of Chapter 162 of the South Carolina Code of 1932, and of requiring the said respondents to comply with said Acts and the rules and orders of the Railroad Commission thereunder, and to show by what authority if any they are continuing to operate their motor transportation business in the State of South Carolina without complying with the aforesaid Acts, and for the purpose of enjoining and restraining the said respondents from operating their motor transportation business in the State of South Carolina except by obtaining the certificate, paying the fees, and otherwise complying with the said Acts.

Wherefore petitioners pray that the said Acts hereinabove referred to regulating motor transportation in the State of South Carolina be construed and enforced by this Court, and that the respondents be ordered and directed to comply with the said Acts regulating the said motor transportation business in the State of South Carolina, and be so enjoined and restrained from carrying on the said business except by complying with the said laws.

3 August, 1932.

John M. Daniel, Attorney General; Cordie Page, Assistant Attorney General; J. Ivey Humphrey, Assistant Attorney General; Irvine F. Belser; Special Counsel for the Railroad Commission, Attorneys for Petitioners.

[fol. 8] *Duly sworn to by Jno. C. Coney. Jurat omitted in printing.*

IN SUPREME COURT OF SOUTH CAROLINA

RETURN AND ANSWER

The respondent M. D. Hicklin in his individual capacity and as a representative of Contract or Class "F" Carriers of freight, reserving his rights under the demurrer herewith served, for a return and answer to the petition herein, by his attorneys R. Wofford Wait and James H. Fowles:

1. Admits the truth of the allegations of paragraphs 1, 3, 5, and 7 of the petition herein.

2. Admits all of the facts alleged in the second and fourth paragraphs of the petition, but denies the legal conclusions thereof that the respondent is subject to the jurisdiction, control and regulation of the petitioners or that the respondent is now operating in violation of law.

3. Denies the allegations of paragraph 6 of the petition.

4. Specifically denies each and every allegation of fact and conclusion of law in the petition contained, save as herein admitted and modified.

5. Further answering, respondent says that as to him and all other Class "F", or contract, carriers, said Act No. 170 of 1925, as amended, now appearing as Sections 8507 to 8524, both inclusive, of Chapter 162, Volume III. Code of Laws of South Carolina, 1932 (hereinafter, for the sake of brevity, cited as the "Civil Code"), is unconstitu- [fol. 9] tional and void, in that in Section 8508 of the Civil Code (Section 2 of Act No. 170 of 1925, as amended) it is provided:

"That nothing in sections 8507 to 8524 contained shall apply to motor vehicles while used exclusively for transportation of persons to and from schools, Sunday schools, churches, or religious services of any kind, or to and from picnics or upon special or pre-arranged excursions, or to United States mail carriers operating star routes while engaged solely in carrying mail, or farmers or dairymen, hauling dairy or farm products; or lumber haulers engaged in transporting lumber or logs fom the forest to the shipping points":

and respondent says that the said exceptions and exclusions deny to him the equal protection of the law, and

deprives him of his property without due process of law, in contravention of the Fifth and Fourteenth Amendments to the Constitution of the United States of America, and in violation of Article I, Section 5 of the Constitution of the State of South Carolina. Respondent denies that the proviso to Section 8509 of the Civil Code above quoted "was and is mere surplusage, and was intended in fact to exempt such persons only when they were hauling their own products and not engaged in transportation for hire", as alleged in paragraph 6 of said petition, and says, on the contrary, that it was the express intention of the legislature to exclude from the operation of said Act the persons and classes mentioned and described in said proviso. Respondent denies that the petitioners have either limited or attempted to limit the exemptions in said proviso relating to farmers, dairymen and lumber haulers to such persons only when hauling their own products, and says that if the petitioners have so construed the said proviso, as alleged, their action in so doing has been utterly unwarranted, illegal, ultra vires, and in flagrant violation of their duty. That it is beyond the power of this Court, should it hold that the exemptions in said proviso render the said Act [fol. 10] unconstitutional, to "strike out" the proviso, as that is a purely legislative function; and if the effect of said proviso is to exempt certain favored classes from the application to them of the requirements of said Act, it necessarily renders the whole Act bad in all of its provisions relating to Class "F", or contract, carriers.

6. Further answering, respondent says that the tax or assessment provided in Section 34 of the General Appropriation Act of 1932 for the support of the Motor Transport Division of the Railroad Commission and therein required to be paid by the "Motor Transport Carriers for hire subject to the regulation of the Railroad Commission" is unconstitutional and void as to him and all other Class "F", or contract, carriers, because they are not "subject to regulation by the Railroad Commission" in as much as Act No. 170 of 1925, as amended (Chapter 162, Civil Code), is unconstitutional and void as to them, as hereinbefore set forth.

7. That said Act No. 170 of 1925, as amended (Civil Code, Chapter 162), is also unconstitutional and void as

to this respondent and all other Class "F", or contract, carriers, in two other respects: (a) because it seeks to impose upon him and them all of the burdens, duties and liabilities of common carriers, especially with reference to the requirements (Section 8511) relating to cargo insurance; and (b) because it imposes upon the Railroad Commission (Section 8516) the duty—which, however, so far the said Commission has never undertaken to perform or discharge—of regulating the rates and charges of private or contract carriers, as well as those of common carriers, the doing of which would deprive them of their property without compensation, in violation of the aforesaid constitutional provisions.

Wherefore, your respondent prays that he be adjudged to have answered fully the order and rule to show cause heretofore issued herein, that the provisions of Chapter 162 of the Civil Code applicable to Class "F", or contract, carriers, be declared to be unconstitutional and void, that [fols. 11–11c] the petitioners herein, their agents, servants and employees, and all other persons, be permanently restrained and enjoined from enforcing in any wise, or attempting to enforce, the Acts mentioned and referred to in the order and rule to show cause herein, or any of the several provisions thereof, applicable to Class "F", or contract, carriers, or any of the rules or orders of the Railroad Commission thereunder, or any of the respondent's alleged liabilities thereunder, against the respondents and those whom he represents, and that the petition herein be dismissed, with costs.

And your respondent will ever pray, etc.

B. Wofford Wait, James H. Fowles, Solictors for Respondent.

Columbia, South Carolina, August 22, 1932.

Duly sworn to by M. D. Hicklin. Jurat omitted in printing.

Acceptance of Service

Service accepted and a copy retained at Columbia, South Carolina, this 22nd day of August, 1932.

——— ———, Attorney for Petitioners.

[fol. 12] IN SUPREME COURT OF SOUTH CAROLINA

REPLY

To the Honorable Eugene S. Blease, Chief Justice; T. P. Cothran, Associate Justice; John G. Stabler, Associate Justice; Jesse F. Carter, Associate Justice; M. L. Bonham, Associate Justice:

The petitioners above named, by way of reply to the Return and Answer of the Respondents in the above entitled case, would respectfully show to this Honorable Court:

[fol. 13] 1. That your petitioners, constituting the Railroad Commission of the State of South Carolina, have uniformly construed the Motor Transportation Acts referred to in the petition herein, as exempting farmers and dairymen only when hauling their own product-, or only when hauling them occasionally and not as a regular business, and that the Commission has recently adopted a formal regulation to that effect, and has had the same duly promulgated to all motor transportation carriers operating for hire in the State of South Carolina:

That the said regulation so promulgated is as follows:

"The proviso under Section 2 of Act No. 170 of the Acts of 1925, as amended, providing that nothing contained in said section shall apply to farmers or dairymen hauling dairy or farm products is construed by the Railroad Commission in the performance of its duties in the enforcement of said Act to mean that nothing in the said section shall apply to farmers or dairymen hauling their own dairy or farm products, or to farmers and dairymen who occasionally, but do not regularly as a part of an established business, haul farm and/or dairy products for others for hire, but that persons who may also be engaged in part in farming operations but who make a regular business of transporting farm and/or dairy or other products for others for hire are not to be deemed farmers or dairymen for the purpose of this Act, and hence are required to comply with the act in all respects like other persons engaged in motor transportation for hire."

That there is attached hereto, and made a part hereof, an affidavit of W. W. Goodman, Superintendent of the

Motor Transportation Division, which shows in detail how the said Act has been, and is being, enforced so far as the said exemptions are concerned.

2. That moreover, the petitioners know of their own personal knowledge, and this Court should take judicial notice thereof, that farmers and dairymen, in so far as they use [fol. 14] the highways of the State of South Carolina at all, use them only seasonally and spasmodically; that there are practically only two seasons in the year when there is any occasion whatsoever for the farmers to make any use of the highways, that is during the months of May, June, and July, when certain truck crops are harvested, and during the fall months of September, October, and November, when the staple crops, such as cotton, corn and peas, are harvested, but that the use made by farmers of the said highways is very small and relatively insignificant as compared with the use made of such highways by the respondents and others regularly engaged in the business of contract hauling for compensation over the highways of the State of South Carolina:

That moreover such farmers and dairymen as do use the highways of the State of South Carolina generally have very small and light trucks and engage in only very short hauls:

That on the contrary respondents and others in like situation engaged regularly in the business of transport hauling make a much more extensive use of the highways, operating throughout the State from one end to the other, and furthermore use much heavier and larger trucks. Consequently, the wear and tear upon the highways in the State of South Carolina from persons regularly engaged in contract hauling for hire, such as the respondents herein, is much more serious than that occasioned by farmers and/or dairymen, and/or lumber hauling:

That in general the same statements hereinabove made as applicable to farmers are also applicable to dairymen and lumber haulers, and that as hereinabove shown in the regulation promulgated by this Commission, when and if farmers and/or dairymen engage regularly in the business of hauling for others for compensation, they are no longer deemed to be farmers or dairymen for the purpose of this Act and, hence are required to comply with the Act like all other persons engaged in transportation for hire.

[fol. 15] The said Act as so construed by your petitioners, and as the same should be construed, is entirely valid and constitutional and works no unlawful discriminations against the respondents herein.

As to the remaining allegations of the said answer and return:

Petitioners allege and show to this Court that the said answer and return do not constitute or show any defense in this suit to the petition and order heretofore issued herein, that there is no allegation or showing that the petitioners have unlawfully interfered with the respondents' interstate operations, and that your petitioners did not in any way improperly or unlawfully interfere with respondents' interstate operations; that there is no showing or contention that the petitioners have in any way interfered with any of respondents' constitutional or other rights, and hence that the said petition should be granted and that judgment should be rendered by this Honorable Court as prayed for in the said petition.

Wherefore your petitioners pray that the said answer and return be declared insufficient, and that the Court grant the relief prayed for in the petition.

Columbia, S. C., October 5, 1932.

John M. Daniel, Attorney General. Cordie Page, Assistant Attorney General. Irvine F. Belser, Special Counsel for Railroad Commission of South Carolina.

[fol. 16] *Duly sworn to by Jno. C. Coney. Jurat omitted in printing.*

Affidavit of W. W. Goodman

Personally appeared before me W. W. Goodman, who being first duly sworn, deposes and says, that, as Superintendent of the Motor Transportation Division of the Railroad Commission of South Carolina, he occupied this position since January 1, 1926, and that he has been connected with the work ever since the passage of the Act in 1925; that, in his work he has been personally familiar with every license issued under the provisions of the Act since the passage of the Act of 1925; that, the Act has been construed and applied uniformly to persons carrying on the

business of transporting property for hire over the public highways of the State; that, all persons coming within the class of contract carrier and operating over the highways of this State for compensation are required to secure a Class F Certificate, and pay the fee, and if any person operates over the highways of the State for compensation without securing the license it is without the knowledge of deponent or the Railroad Commission; that, he knows of his own knowledge that the Railroad Commission has not and is not exempting any persons from the payment of the tax who is carrying on the business similar to the respondent in this action; that, there are a number of farmers, [fols. 17 & 18a] dairymen, and lumbermen, paying the tax when they operate on the highways for compensation, as does the respondent herein; that, he does not recall specifically the names of farmers who are operating as the papers on file do not show that they are farmers and, therefore, he is unable to give the names of individual farmers who are paying the tax, but that he knew at the time the licenses were granted that the applicants were farmers; that, the Milk Transport Company of Denmark, South Carolina, is required to pay the fee for hauling dairy products; that, Jerry T. Riley, of Ridgeville, South Carolina, runs a dairy and farm, hauls his own products and the products of others for compensation, and is, therefore, required to pay the fee provided in the Act; that, the Standard Lumber Company of Orangeburg, South Carolina, is operating under a Class F Certificate and pays the fee provided by the Act; that, persons hauling fruit from Florida over the highways of this State for compensation are paying the tax, and if any such persons, or any other persons, are using the highways for compensation without securing the license and paying the fee provided in the statute, it is unknown to The Railroad Commission of South Carolina; that, there may be those who violate the law without the knowledge of The Railroad Commission, but no person is operating on the highways for compensation as a part of a regular business with the approval or consent of the Commission, without obtaining the Certificate and paying the fees.

(Signed) (Signature of Affiant) W. W. Goodman
L. S.

Sworn to and subscribed before me at Columbia, South Carolina, this 16th day of December, 1931. (Signed) D. Fred Little, Notary Public in and for South Carolina.

[fol. 18b] IN SUPREME COURT OF SOUTH CAROLINA

Case No. 339

THE STATE OF SOUTH CAROLINA ex Relatione J. C. CONEY, Earle R. Ellerbe, Sam C. Blease, J. H. Nance, Thomas H. Tatum, J. A. Beamguard, and B. J. Pearman, as Members of and Constituting the Railroad Commission of South Carolina, Petitioners,

vs.

M. D. HICKLIN, Individually and as a Representative of Class "F" Carriers Within the Provisions of Sections 8507-8530 of Chapter 162 of the South Carolina Code of 1932, Who are, or Claim to be, Engaged in Interstate Commerce as Well as Intrastate Operations Within the State of South Carolina, Respondents,

and

EARLE R. ELLERBE, J. C. CONEY, SAM C. BLEASE, J. H. NANCE, Thomas H. Tatum, J. A. Beamguard, and B. J. Pearman, as Members of and Constituting the Railroad Commission of South Carolina, Petitioners,

vs.

BLALOCK MOTOR EXPRESS, INC., Respondents

In the Original Jurisdiction

Demurrers Overruled and Petitions Granted

John M. Daniel, Attorney General, and Irvine F. Belser, both of Columbia, for petitioners.

B. Wofford Wait, of Tampa, Fla.; Nathans & Sinkler, of Charleston, and James H. Fowles, of Columbia, for respondents.

OPINION No. 13564—Filed January 27, 1933

STABLER, J.:

These two suits, instituted in the original jurisdiction of the Court, were heard together on argument and will be disposed of in one opinion. For the sake of convenience we will refer to them as the Hicklin Case and the Blalock Case. With the exception of one question applicable only to the latter, the questions involved in the two cases are identical.

It is alleged and admitted that the respondents come within Class "F" of motor vehicle carriers, defined in the amendatory act of April 7, 1930 (36 Stat. at Large, Page 1068), as consisting of persons, firms or corporations proposing to engage in the business known as contract hauling of freight or property, but not proposing to operate upon a regular schedule or over a regular route or to receive patronage along the route, and as such are required by the act to obtain a certificate to operate and to pay the [fol. 19] license fee therefor. It is further alleged that the respondents are now "carrying on their motor transportation business in the State of South Carolina over the public highways without any certificate and without paying any of the fees or taxes therefor, and in violation of the said laws hereinabove mentioned and of the orders and rules of the Railroad Commission issued thereunder".

The purpose of these actions, as set forth in the petitions, is to enforce the provisions of sections 8507 to 8530, inclusive, of chapter 162 of the Code of 1932 (acts of 1925, page 252; of 1928, page 1238; of 1930, pages 1068, 1100 and 1327; and of 1931, page 145), and to require the respondents to comply with these acts and the rules and orders of the Railroad Commission promulgated thereunder. The prayer of the petitions is that these acts be construed and enforced by this Court, that a mandatory order of injunction issue directing and requiring the respondents to comply therewith, and that they be enjoined from engaging in business as contract haulers without such compliance.

The respondents interposed demurrers to the petitions and also made returns and answers.

With regard to the demurrers, it is sufficient to say that the identical grounds made in these cases were considered by the Court in King vs. Ætna Insurance Company, et al.,

in its opinion filed November 23, 1932 (Westbrook's Advance Sheets, page 23). Chief Justice Blease, who wrote the opinion in that case, went into a full discussion of the questions made and disposed of them adversely to the contentions of the respondents there and here.

By their returns and answers the respondents challenge the constitutionality of the acts referred to (chapter 162 of the Code of 1932), section 66 of the general appropriation act of 1931, and section 34 of the general appropriation act of 1932, applicable to contract carriers, as to both State and Federal constitutions, contending that they are invalid because of certain exemptions made, requirements relating to cargo insurance, authority conferred on the Railroad Commission to regulate rates of contract carriers, the imposition of license fees based upon "carrying capacity", and the imposition of a tax upon the "gross receipts" of a carrier doing an interstate as well as an intrastate business.

In Stephenson vs. Binford, 77 L. Ed. 203, a very recent utterance of the United States Supreme Court as to the right and power of a State to regulate the use of its highways, the Court stated this broad general rule:

"It is well established law that the highways of the State are public property; that their primary and preferred use is for private purposes; and that their use for purposes of gain is special and extraordinary, which, generally at least, the Legislature may prohibit or condition as it sees fit"—citing cases.

Section 8507 of the Code defines "motor vehicle carrier", for the purposes of the act, as "every corporation or person * * * * operating * * * any motor propelled vehicle * * * used in the business of transporting persons or property for compensation over any improved public highway * * * as hereinafter defined, in this State".

I

Section 8508 of the Code, which contains certain exemptions, is as follows:

"No corporation or person, their lessees, trustees, or re- [fol. 20] ceivers, shall operate any motor-propelled vehicle as herein before defined for transportation of persons or

property for compensation on any improved public highways in this State, except in accordance with the provisions of sections 8507 to 8524, and such operation shall be subject to control, supervision and regulation by the commission in the manner provided by sections 8507 to 8524: Provided, however, That nothing in sections 8507 to 8524 contained shall apply to motor vehicles while used exclusively for transporting persons to and from schools, Sunday Schools, churches, or religious services of any kinds, or to or from picnics or upon special prearranged excursions, or to United States mail carriers operating star routes, while engaged solely in carrying mail, or to farmers or dairymen, hauling dairy or farm products; or lumber haulers engaged in transporting lumber and logs from the forest to the shipping points".

The respondents urge that the exemption of "farmers or dairymen, hauling dairy or farm products, or lumber haulers engaged in transporting lumber and logs from the forest to the shipping points", is discriminatory, and violates the fifth and fourteenth amendments to the Federal Constitution and section 5 of Article I of the State Constitution. The petitioners contend that the Railroad Commission has adopted regulations embodying the construction placed by it upon this provision, to the effect that the exemption applies only to farmers and dairymen who are engaged in hauling their own products and to farmers and dairymen who, occasionally, but not regularly, haul farm or dairy products for others, those who make a regular business of transporting farm and dairy products not being deemed for the purpose of the act to be farmers. They also contend that even if the construction placed upon the provision of the act by the Commission be rejected, there is a valid basis of discrimination in favor of farmers and dairymen hauling farm and dairy products in that they make only a limited use of the highways. The respondents answer that the construction given to the provision by the Commission cannot be sustained without the insertion of additional words—which, in effect, would be judicial legislation.

In support of their contention, counsel for respondents rely in the main upon the case of Smith vs. Cahoon, 283 U. S. 553; 51 S. Ct., 582; 75 L. Ed. 1264, in which the United

States Supreme Court declared unconstitutional a statute of the State of Florida enacted for the purpose of regulating auto transportation in that State. The act construed contained the following section:

"The term 'auto transportation company', when used in this Act, means every corporation or person, their lessees, trustees or receivers, owning, controlling, operating or managing any motor propelled vehicle not usually operated on or over rails, used in the business of transporting persons or property for compensation or as a common carrier over any public highway in this State between fixed termini or over a regular route: Provided, That the term 'auto transportation company' as used in this Act, shall not include corporations or persons engaged exclusively in the transportation of children to or from school, or any transportation company engaged exclusively in the transporting agricultural, horticultural, dairy or other farm products and fresh and Salt Fish and Oysters and Shrimp from the point of production to the assembling or shipping point enroute to primary market, or to motor vehicles used exclusively in transporting or delivering dairy products or any transportation company engaged in operating taxicabs, or hotel busses from a depot to a hotel in the same town or city.".

In support of their position, petitioners rely mainly upon the case of Baking Company vs. Woodring, 286 U. S. 352, 52 S. Ct. 595, 76 L. Ed. 816, a Kansas case, in which the United States Supreme Court declared an act of that State [fol. 21] relating to the regulation of motor traffic constitutional. Sections 1 and 2 of the Act are as follows (special attention is directed to section 2, by way of comparison with the above quoted provision of the Florida Act):

"Section 1. (a) The term 'motor vehicle' when used in this act means any automobile, automobile truck, trailer, motor bus, or any other self-propelled or motor-driven vehicle used upon any public highway of this state for the purpose of transporting persons or property. (b) The term 'public motor carrier of property' when used in this act shall mean any person engaged in the transportation by motor vehicle of property for hire as a common carrier having a fixed termini or route. (c) The term 'contract

motor carrier of property' when used in this act shall be construed to mean any person not a public motor carrier of property engaged in the transportation by motor vehicle of property for hire as a business. (d) The term 'private motor carrier of property' when used in this act shall be construed to mean any person engaged in the transportation by motor vehicle of property sold or to be sold by him in furtherance of any private commercial enterprise. (e) The term 'public motor carrier of passengers' when used in this act shall mean any person engaged in the transportation by motor vehicle of passengers or express for hire as a common carrier having a fixed termini or route. (f) The term 'contract motor carrier of passengers' when used in this act shall be construed to mean any person not a public motor carrier of passengers engaged in the transportation by motor vehicle of passengers or express for hire. (g) The term 'public highway' when used in this act shall mean every public street, road or highway or thoroughfare of any kind used by the public."

"Section 2. That this act shall not apply to motor carriers who shall operate wholly within any city or village of this state, or private motor carriers who operate within a radius of twenty-five miles beyond the corporate limits of such city, or any village, nor to the transportation of live stock and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle; or to the transportation of children to and from school."

The Court in the Baking Company case, in distinguishing that case from the Cahoon case, had this to say:

"The third exemption applies to 'the transportation of livestock and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle'. In Smith vs. Cahoon, supra, the state statute, which applied to all carriers for compensation over regular routes, including common carriers, exempted from its provisions 'any transportation company engaged exclusively in the transporting agricultural, horticultural, dairy or other farm products and fresh and Salt Fish and Oysters and Shrimp from the point of production to the assembling or shipping point enroute to primary market, or to motor vehicles used exclusively in transporting or delivering dairy products'.

The stated distinction was thus established between carriers, and between private carriers, notwithstanding the fact that they were 'alike engaged in transporting property for compensation over public highways between fixed termini or over a regular route'. The Court was unable to find any justification for this discrimination between carriers in the same business, that is, 'between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general or other useful commodities'.

[fol. 22] The distinction in the instant case is of a different sort. The statute does not attempt to impose any arbitrary discrimination between carriers who transport property for hire, or compensation, with respect to the class of products they carry. The exemption runs only to one who is carrying his own livestock and farm products to market or supplies for his own use in his own motor vehicle. In sustaining the exemption, the District Court referred to the factual basis for the distinction. 'The Legislature knew', said the Court, 'that as a matter of fact farm products are transported to town by the farmer, or by a non-exempt 'contract carrier' employed by him. The Legislature knew that as a matter of fact the use of the highways for the transportation of farm products by the owner is casual and infrequent and incidental; farmers use the highways to transport their products to market ordinarily but a few times a year. The Legislature rightly concluded that the use of the highways for carrying home his groceries in his own automobile is adequately compensated by the general tax imposed on all 'motor vehicles'. 55 F. (2d) at page 352. And the Court properly excluded from consideration mere hypothetical and fanciful illustrations of possible discriminations which had no basis in the actual experience to which the statute was addressed. The court found a practical difference between the case of the appellants 'who operate fleets of trucks in the conduct of their business and who use the highways daily in the delivery of their products to their customers', and that of 'a farmer who hauls his wheat or livestock to town once or twice a year'. The Legislature in making its classification was entitled to consider frequency and character of use and to adapt its regulations to the classes of operations, which by

reason of their habitual and constant use of the highways brought about the conditions making regulation imperative and created the necessity for the imposition of a tax for maintainance and reconstruction. As the Court said in Alward v. Johnson, 282 U. S. 509, 513, 514, 51 S. Ct. 273, 274, 75 L. Ed. 496, 75 A. L. R. 9: 'The distinction between property employed in conducting a business which requires constant and unusual use of the highways and property not so employed is plain enough.' See, also, Bekins Van Lines v. Riley, 280 U. S. 80, 82, 50 S. Ct. 64, 74 L. Ed. 178; Carley & Hamilton v. Snook, 281 U. S. 66, 73, 50 S. Ct. 204, 74 L. Ed. 704, 68 A. L. R. 194."

The petitioners also rely upon the case of Schwartzman Service vs. Stahl, 60 F. (2 Ed.) 1034. This decision was rendered by a three-judge Court, and, while not controlling as an authority, is able and persuasive. The statute construed in that case contains certain exemptions from the obligations and duties imposed by the act, among these being one that the act should not apply to "motor vehicles used exclusively in transporting farm and dairy products from the farm or dairy to warehouse, creamery or other original storage or market". This exemption was held to be reasonable and not arbitrary, and not to render the act unconstitutional. In its opinion the Court made the following pertinent observations:

"It must be acknowledged that the state has the power to regulate and control the movements of motor vehicles over its highways. This it may do in the interest of public convenience and safety and for the protection of the highways. Provisions of this character have been uniformly sustained. Buck v. Kuykendall, 267 U. S. 307, loc. cit. 314, 45 S. Ct. 324, 69 L. Ed. 623, 38 A. L. R. 286; Stephenson v. Binford, et al. (D. C.), 53 F. (2d) 509.

Moreover, while 'a citizen may have, under the Fourteenth Amendment, the right to travel and transport his property upon them by auto vehicle', yet 'he has no right to make the highways his place of business by using them as a common carrier for hire. Such use is a privilege which [fol. 23] may be granted or withheld by the state in its discretion, without violating either the due process clause or the equal protection clause'. Packard v. Banton, 264 U. S. 140, loc. cit. 144, 44 S. Ct. 257, 68 L. Ed. 596.

The highways belong to the state. It may make provisions appropriate for securing the safety and convenience of the public in the use of them. Kane v. State of New Jersey, 242 U. S. 160, 37 S. Ct. 30, 61 L. Ed. 222.

Assuming, therefore, the power and right of the state to regulate and supervise its highways, such right cannot be hampered or restricted within narrow bounds. On the contrary, to the end that such right might be fully enjoyed and exercised, there is a constant recognition of the principle that the state 'has a broad discretion in classification in the exercise of its power of regulation'. Smith v. Cahoon, 283 U. S. 553, loc. cit. 566, 51 S. Ct. 582, 587, 75 L. Ed. 1264. Upon such classification, no person can interpose an objection, save only in those cases where the classification or discrimination is entirely arbitrary".

See also Sproles vs. Binford, 286 U. S. 374, 52 S. Ct. 581, 76 L. Ed. 827, in which the United States Supreme Court upheld a discrimination in favor of "implements of husbandry", construed to mean tractors, plows, etc., the use of the highways for this sort of transportation, as was pointed out, being temporary only. It also upheld an exemption in favor of vehicles transporting "property from point of origin to the nearest practicable common carrier receiving or loading point or from a common carrier unloading point by way of shortest practicable route to destination". The Court distinguished the case from Smith vs. Cahoon and thus stated the basis of its decision: "But the Legislature in making its classification was entitled to consider frequency and character of use and to adapt its regulations to the classes of operation, which by reason of their extensive as well as constant use of the highways brought about the conditions making the regulations necessary. Continental Baking Company vs. Woodring, supra".

The petitioners contend that the Cahoon case may be validly distinguished in the cases at bar as it was in the cases cited, and in this we agree. In the first place, in the Cahoon case, the Court was dealing with a criminal prosecution, which point it stressed, saying: "It should be observed that this is not an action in equity where the enforcement of a statute awaits the final determination of the Court as to validity and scope". The cases before us are suits in equity, in which this Court is asked to construe the acts in question. Also, in that case, the discrimination

was in favor of "any transportation company" engaged in hauling the class of products therein mentioned, while in the cases at bar the discrimination is in favor of farm and dairy products only when hauled by farmers and dairymen, and in favor of lumber haulers engaged in transporting lumber and logs from the forest to the shipping points. In other words, there is a double element involved in the classification in this case, the class of persons and the class of products, while there was only one element of classification involved in the Cahoon case, namely, the class of products.

It must be conceded, as has been held in German Alliance Insurance Company vs. Kansas, 233 U. S. 389, that even though an exemption operates as a discrimination, it is not necessarily invalid; and, also, as is generally held, that a classification or discrimination should be allowed to stand unless it is entirely arbitrary. Unquestionably, the use by farmers and dairymen for the transportation of farm and dairy products is seasonal and involves only a moderate use of the highways; and the exemption here is further limited by the fact that it can apply only to one whose principal business is that of a farmer or dairyman and not [fol. 24] to one merely incidentally engaged in farming or dairying. As pointed out in the Woodring case, there is a practical difference between such use of the highways and that made by the respondents in this case, "who operate fleets of trucks in the conduct of their business and who use the highways daily in the delivery of their products to their customers", the Court holding, as we have seen, that the Legislature in making its classification was entitled to consider frequency and character of use, etc. In addition, there is this material consideration, that farming and dairying lie at the foundation of our economic structure and are essential to the public welfare.

We think the respondents have failed to sustain the burden cast upon them of showing beyond a reasonable doubt that the exemption in question renders the act unconstitutional and invalid.

It will be observed that this conclusion has been reached independently of the construction placed by the Railroad Commission upon the contested provision of the Act. We think that this construction is, in part, unsound. One hauling his own products in his own motor vehicle does not

come within the purview of the act and no provision for his exemption is necessary. The act applies only to those who are carriers for compensation, and the exemption can refer only to farmers and dairymen hauling farm and dairy products for compensation. The same may be said with regard to those hauling lumber and logs from the forest to the shipping points. See Sproles vs. Binford, supra.

II

The respondents also contend that the acts in question are invalid "because the requirements of section 8511 that contract carriers must obtain and carry cargo insurance violates the fifth amendment to the Constitution of the United States".

Section 8511 provides:

"The commission shall, in the granting of a certificate, require the applicant to procure and file with said commission liability and property damage insurance, or surety bond with some casualty or surety company authorized to do business in this state, on such motor vehicle or vehicles to be used in the service aforesaid, in such amount as the commission may determine, insuring or indemnifying passengers or cargo and the public receiving personal injury by reason of any act of negligence, and for damage to property of any person other than the assured; such policy or bond to contain such conditions, provisions, and limitations as the commission may prescribe and the same shall be kept in full force and effect, and failure to do so shall be cause for the revocation of such certificate".

Respondents argue that one of the principal differences between a common carrier and a private or contract carrier is, that the common carrier is an insurer, while the private or contract carrier is not; and that the Legislature cannot compel private carriers to become or to assume the duties and liabilities of common carriers. They contend that in our statute the Legislature attempted to put both classes of carriers upon an identical footing and subject them to the same obligations, which was beyond their power to do, citing in support of their contention Michigan Public Utilities Commission vs. Duke, 266 U. S. 570, 45 S. Ct. 191, 69 L. Ed. 445, 36 A. L. R. 1105, where it is said

that: "It is a burden upon interstate commerce to impose on plaintiff the onerous duties and strict liability of common carrier, and the obligation of furnishing such indemnity bond to cover the automobile bodies hauled under his contracts as conditions precedent to his right to continue to carry them in interstate commerce. * * *. Clearly, these requirements have no relation to public safety or order and the use of motor vehicles upon the highways, or [fol. 25] to the collection of compensation for the use of the highways. The police power does not extend so far". But, as pointed out in the Stephenson case, supra, the State statute construed in the Duke case expressly provided that all persons engaged in the transportation of persons or property for hire by motor vehicle upon the public highways of the State should be common carriers.

Similarly, as also pointed out in the Stephenson case, Front Trucking Company vs. R. R. Commission, 271 U. S. 583, involved a state statute which had been construed by the California Supreme Court as requiring a private contract carrier to dedicate his property to the business of public transportation and to subject himself to all the duties and burdens imposed by the act upon common carriers; and the United States Supreme Court, in accordance with the settled rule, accepted such construction as binding upon it.

Our statute, however, like that construed in the Stephenson case, expressly recognizes the distinction between common carriers and private contract carriers; and from an examination of the entire act it is clear that the Legislature did not intend to put common carriers and private contract carriers on the same footing with regard to the matters here complained of. We think, and so hold, that in the case of private carriers, or contract carriers, the provisions of section 8511 extend no further than to require such carriers to execute an indemnity bond, as the commission may prescribe under the provisions of the act, for the protection of the public receiving injury, either in person or in property, by reason of any act of negligence of such private or contract carriers. We do not think it was the intent of the Legislature, in the passage of the act, to require contract carriers to obtain and carry cargo insurance, and we construe the act as not imposing upon them such requirement.

III

The respondents further contend that the act is invalid "because the provisions of section 8516 vesting in the Railroad Commission the power and authority, and imposing upon it the duty, of regulating the rates of contract carriers is likewise in violation of said constitutional provisions, being an unwarrantable interference with the right of private contract".

Section 8516 reads as follows:

"The commission is hereby vested with power and authority and it shall be their duty to supervise and regulate every motor carrier in this State; to fix or approve the rates, fares, charges, classification and rules and regulations pertaining thereto, of each such motor carrier: Provided, however, That the rate now obtaining by the respective motor carriers shall remain in effect until such time, when pursuant to complaint and proper hearing, the commission shall have determined that said rate or rates are unreasonable: Provided, That the said commission shall fix as to class certificate C a maximum rate only."

As it is conceded that the Railroad Commission, which is vested with the power and authority to fix and approve rates, etc., as provided by section 8516, has never, since the enactment of the law, exercised its power, if any it has under the act, to supervise and regulate rates of contract carriers, the respondents here have no ground for complaint. See Stephenson vs. Binford, supra.

[fol. 26] IV

It is also contended that the act is invalid "because the license fees required of contract carriers under section 8512 are based solely upon 'carrying capacity', and, hence, insofar as contract carriers engaged in interstate commerce are concerned, are void because they are not compensatory, and therefore violate article I, section 8, of the constitution of the United States, and the fifth and fourteenth amendments thereto".

With regard to holders of certificate F, to which class the respondents herein belong, section 8512 provides:

"For vehicles of carrying capacity of not over one and one-half tons, thirty ($30.00) dollars; for vehicles of carrying capacity of over one and one-half tons and not over two tons, sixty ($60.00) dollars; for vehicles of carrying capacity of over two tons and not over three tons, one hundred twenty ($120.00) dollars; for vehicles of carrying capacity of over three tons and not over four tons, two hundred ($200.00) dollars; for vehicles of carrying capacity of over four tons and not over five tons, four hundred ($400.00) dollars; for vehicles equipped fully with pneumatic tires: for vehicles equipped fully or partially with solid tires these fees shall be doubled".

In the Duke case, supra, the United States Supreme Court said:

"A state which, at its own expense, furnishes special facilities for the use of those engaged in intrastate and interstate commerce may exact compensation therefor, and if the charges are reasonable and uniform, they constitute no burden on interstate commerce. Hendrick v. Maryland, 235 U. S. 610, 622, 59 L. Ed. 385, 390, 35 Sup. Ct. Rep. 140; Kane v. New Jersey, 242 U. S. 160, 167, 71 L. ed. 222, 226, 37 Sup. Ct. Rep. 30. Such regulations are deemed to be reasonable and to affect interstate commerce only incidentally and indirectly".

We have made a careful examination of the authorities with reference to this particular contention and think it is without merit. Such fees are collected, as provided for by section 8517, for the purpose of maintaining the public highways over which such motor vehicles shall operate, as compensation for their use. Further, they are reasonable as to amount and tend to contribute to the protection of the highways. We do not think that the provision of the act here complained of constitutes an undue burden on interstate commerce.

V

The respondents in the Blalock case also raise a question as to the tax imposed on all carriers for hire under section 66 of the general appropriation act of 1931, which they attack as being violative of the interstate commerce clause of the United States Constitution, for the following reasons:

"(a) That said tax, imposed by the terms of said Act upon the 'gross receipts' of such carriers, was a tax upon receipts from *interstate* as well as *intrastate* business, constituted a burden on interstate commerce in contravention of Article 1, Section 8, of the Constitution of the United States, and (b) was not in lieu of all other taxes, in violation of said last named provision and the Fourteenth Amendment".

It is well settled that the State may impose taxes upon the intrastate operations of a motor carrier though such [fol. 27] motor carrier is also engaged in interstate operations. Interstate Busses Corporation vs. Blodgett, 276 U. S. 245, 48 S. Ct. 230, 72 L. Ed. 551. It was also there held that in a case of this sort the burden is upon the complainant to show that in actual practice the tax operates to deprive him of his constitutional rights, because the aggregate charge bears no reasonable relation to the privilege granted. Also, it was said by the Court in the Continental Baking Company case, supra, that the Court should exclude "from consideration more hypothetical and fanciful illustrations of possible discriminations which had no basis in the actual experience to which the statute was addressed". In the case at bar the evidence is clear that the Railroad Commission has not at any time undertaken to construe the acts in question as imposing any taxes upon interstate operations, and until this is done, respondent has no cause for complaint. See Stephenson vs. Binford, supra.

The judgment of this Court is:

First. That the demurrers interposed by the respondents be, and the same are hereby, overruled.

Second. That the Acts in question are construed as herein indicated, and that the taxes and license fees required of the respondents by the petitioners thereunder are lawful and due, and that the petitioners be authorized to proceed to the collection thereof.

Third. That the petitioners have the right to apply to this Court hereafter for the issuance of such order, or orders, writ or writs, as may be necessary to carry into effect the conclusions and judgment of this Court, and upon their application therefor, at the proper time, that the order

restraining the petitioners from proceeding to enforce the Acts of the General Assembly, referred to in these causes, be dissolved.

Blease, C. J.; Carter and Bonham, JJ., and W. C. Cothran, A. A. J., concur.

[fol. 28] IN SUPREME COURT OF THE UNITED STATES.

[Title omitted]

PETITION FOR APPEAL

To Honorable Eugene S. Blease, Chief Justice of the Supreme Court of South Carolina:

Considering themselves aggrieved by the final decision of the Supreme Court of the State of South Carolina in the above entitled causes (which were consolidated and heard together), the respondents therein, M. D. Hicklin and Blalock Motor Express, Inc., a corporation of the State of South Carolina, hereby pray that an appeal be allowed to the Supreme Court of the United States herein to the end that the decree of the Supreme Court of South Carolina may be there reviewed and considered and justice done these appellants, for the reasons stated in the assignment [fol. 29] of errors accompanying and hereby made a part of this petition; and desiring that the order restraining the petitioners from proceeding to enforce the acts of the General Assembly, referred to in these causes, be continued pending this appeal, and the right accorded to petitioners in said judgment and decree to apply to the Supreme Court of South Carolina for the issuance of such order, or orders, writ, or writs, as may be necessary to carry into effect the conclusions and judgment of said court, be suspended during the pendency of this appeal, the said respondents do hereby further pray this court, being the court so authorized, to exercise its discretion in the granting of a supersedeas, to continue the order restraining the petitioners from proceeding to enforce the said acts of the General Assembly in full force and effect until the appeal of these appellants may be heard and determined in the Supreme Court of the United States; and these respondents further pray that a proper order be made fixing the amount

of bond required of them herein on such appeal, and providing that upon the filing and approval of such bond a supersedeas be issued by this Honorable Court.

Assignment of Errors

The said respondents (appellants herein) assign the following errors in the record and judgment of said Supreme Court of South Carolina, to wit: that said Supreme Court erred in its said decision as follows:

1. In failing to hold that the proviso to Section 2 of Act No. 170 of 1925, Stats. at L., 252, as amended by Acts of 1928, page 1238; Acts of 1930, pages 1068, 1100 and 1327; and Acts of 1931, page 145, appearing, in its amended form, as Section 8508 of the Code of Laws of South Carolina, 1932, Vol. III, page 954, exempting, inter alia, "farmers or dairymen, hauling dairy or farm products, or lumber haulers engaged in transporting lumber or logs from the forest to shipping points" from the requirements of said Act No. 170 of 1925, as amended, supra (which said Act, as amended, now appears as Chapter 162 of said Civil Code, Sections 8507-8524), is discriminatory, and in violation of the Fifth Amendment and of Article I of the Fourteenth Amendment [fol. 30] to the Constitution of the United States.

2. In failing to hold that the provisions of Section 8511 of Code of Laws of S. C., 1932, relative to the requirement that all motor vehicle carriers for compensation should "procure and file with said commission liability and property daamge insurance, or surety bond with some casualty or surety company authorized to do business in this State, on such motor vehicle or vehicles to be used in the service aforesaid, in such amount as the commission may determine, insuring or indemnifying passengers or cargo and the public receiving personal injury by reason of any act of negligence, and for damage to property of any person other than the assured", etc., were applicable to contract carriers, thereby imposing on private contract carriers the onerous duties and strict liabilities of common carriers, and, therefore, in conflict with the Fifth and Fourteenth Amendments to the Constitution of the United States, and, insofar as contract carriers engaged in interstate commerce are concerned, in contravention of Section 8 of Article 1 of said Constitution.

3. In failing to hold that the requirement of Section 8512 of Code of Laws of S. C., 1932, for the payment by contract carriers of license fees based solely upon carrying capacity, insofar as such carriers engaged in interstate commerce are concerned, is void because not compensatory, and, therefore, in violation of said constitutional provisions.

4. In failing to hold that the tax imposed on contract motor carriers for hire by Section 66 of the General Appropriation Act of 1931 was void as to the appellant, Blalock Motor Express, Inc., inasmuch as the said appellant was not "subject to regulation by the Railroad Commission" for the reasons stated in the three preceding assignments of error, and for the further reasons (a) that said tax, imposed by the terms of said Act upon the "gross receipts" of such carriers, was, as to said appellant, a tax upon receipts from its interstate as well as its intrastate business, and constituted a burden on interstate commerce in contravention of Section 8 of Article I of the Constitution [fols. 31–38] of the United States, and (b) was in violation of said provision and of Section 1 of the Fourteenth Amendment to the federal Constitution in that said tax was not in lieu of all other taxes.

5. In failing to hold that the provisions of Section 8516 of Code of Laws of S. C., 1932, vesting in the Railroad Commission the power and authority, and imposing upon it the duty, to regulate the rates of contract carriers, were in violation of the Fifth and Fourteenth Amendments to the Federal Constitution.

6. In failing to hold that the said several statutes deprived appellants of their property without due process of law, and denied them the equal protection of the law.

7. In failing to render judgment in favor of said respondents.

8. In holding the said several statutes to be constitutional acts.

Prayer for Reversal

For which errors the respondents-appellants, M. D. Hicklin and Blalock Motor Express, Inc., pray that the said order, decree and judgment of the Supreme Court of South Carolina, dated Jan. 27, 1933, in the above entitled causes,

be reviewed by the Supreme Court of the United States, and reversed, and that a decree be entered in favor of appellants, and for costs.

B. Wofford Wait, Nathans & Sinkler, Attorneys for Respondents-Appellants.

[fol. 39] In Supreme Court of the United States

[Title omitted]

Order Allowing Appeal—Filed April 26, 1933

This matter comes before the undersigned, Chief Justice of the South Carolina Supreme Court, upon petition and application of M. D. Hicklin, individually, and as a representative of Class "F" Carriers within the provisions of Sections 8507-8530 of Chapter 162 of the South Carolina Code of 1932, and of Blalock Motor Express, Inc. praying for an order herein allowing an appeal to the Supreme Court of the United States from the Supreme Court of the [fol. 40] State of South Carolina and for a supersedeas of the decision of the said Court pending such appeal.

It appears from the said petition and from the record of the above entitled causes, which were consolidated and heard together, that there was drawn in question the validity of Chapter 162 of the South Carolina Code of Laws of 1932, and of the general appropriation act of 1931 (36 Statutes at Large, page 453), and that the decision of the Supreme Court of South Carolina was in favor of the validity of such statutes, and hence this is a proper case for the allowance of an appeal.

The said applicants also asked this Court to grant a supersedeas staying the enforcement of the decision of the Supreme Court of South Carolina and of the statutes therein involved pending the appeal to the United States Supreme Court, and suggest that the amount of the appeal bond should be in an amount only sufficient to cover the taxes and license fees due to be paid by M. D. Hicklin, individually, and by the Blalock Motor Express, Inc. on its own behalf. However, the above entitled suit against M. D. Hicklin was a class suit and was brought against him in-

dividually and as a representative of all the Class "F" Carriers, after the said M. D. Hicklin in the same representative capacity had previously instituted a suit in the United States District Court for the Eastern District of South Carolina to obtain an injunction against the enforcement of the said statutes, which suit is now pending in the said Court. The suit in the State Supreme Court was brought and tried against the said M. D. Hicklin both individually and as a representative of all the Carriers within the said Class, and the above two suits were by consent of all parties consolidated and heard together by the State Supreme Court. It therefore appears to this Court that no supersedeas in this case should be granted unless the said applicants will furnish a supersedeas bond in an amount sufficient to cover the total amount of the license fees and taxes which the State of South Carolina would be [fol. 41] prevented from collecting by reason of the supersedeas. It appears to this Court from the evidence submitted that the amount of such fees and licenses for the years 1932 and 1933 would not be less than $85,000.00. Hence no supersedeas should be granted unless the said applicants will furnish a good and sufficient bond in the said amount of $85,000.00.

An appeal, however, will be allowed, without a supersedeas, upon the said applicants furnishing a suitable cost bond in the sum of $500.00.

Now, therefore, for the foregoing reasons, it is hereby ordered by the undersigned, Chief Justice of the Supreme Court of the State of South Carolina, that the said appeal be and the same is hereby allowed; provided that the said appellants, M. D. Hicklin, individually, and as representative of the Class "F" Carriers, and the Blalock Motor Express, Inc. do each execute to the respondents (petitioners in this Court) within ten days from the date hereof, their respective cost bonds, with surety to be approved by the undersigned, in the sum of $500.00 each, conditioned to prosecute the appeal and as security for costs as provided by law.

It is further ordered that the decision of this Court shall not be stayed unless the said appellants, M. D. Hicklin, individually and as a representative of Class "F" Carriers, and Blalock Motor Express, Inc. shall execute their supersedeas bond to the respondents (petitioners in this Court)

within twenty days from the date hereof in the sum of $85,000.00, conditioned that the said appellants shall answer all damages and costs if they fail to make their plea good according to law to be approved by the undersigned; but that upon the filing of such bond, but not otherwise, an order of supersedeas do issue from this Court, that the [fol. 42] original restraining order be continued in full force and effect during the pendency of this appeal.

It is further ordered that the Clerk of this Court, within thirty days from this date, do make and transmit to the Clerk of the United States Supreme Court, under his hand and seal of this Court, a transcript of the record herein containing a true copy of all material parts of the record herein, which shall be designated by præcipe filed with him by any of the parties hereto.

Done this 24th day of April, 1933.

(Signed) Eugene S. Blease, Chief Justice of the Supreme Court of South Carolina.

Copy of the foregoing order allowing appeal received this the 26 day of April, 1933.

(Signed) J. B. Westbrook, Clerk of the Supreme Court of South Carolina.

[File endorsement omitted.]

[fol. 43] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

WAIVER OF ISSUANCE OF CITATION AND ACKNOWLEDGMENT OF SERVICE

We, John M. Daniel, Attorney General of the State of South Carolina, and Irvine F. Belser, Special Counsel for the Railroad Commission of South Carolina, attorneys of record for the above named Petitioners (Appellees herein), do hereby acknowledge due and timely service of the Petition for Appeal, Assignments of Error, Statement as to Jurisdiction of the Court, and Order allowing Appeal, in the above entitled cause, and receipt of copies thereof, and

do hereby waive the issuance of Citation therein, this 22nd day of May, 1933.

—— ——, Attorney General of South Carolina.
—— ——, Special Counsel for Railroad Commission of South Carolina.

To J. C. Coney et al., as members of and constituting the Railroad Commission of South Carolina, appellees, and to Hon. John M. Daniel, Attorney General of South Carolina, and Hon. Irvine F. Belser, special counsel for Railroad Commission of South Carolina, attorneys of record for said appellees:

Your attention is directed to the following provisions of Rule 12, paragraph 3:

"Within 15 days after such service the appellee may file with the clerk of the court possessed of the record, and serve upon the appellant, a typewritten statement disclosing any matter making against the jurisdiction of this court asserted by the appellant. There may be included in, [fol. 44] or filed with, such opposing statement, a motion by appellees to dismiss or affirm. Where such a motion is made, it may be opposed as provided in Rule 7, paragraph 3."

—— ——, Counsel for Appellant.

[fol. 45] IN SUPREME COURT OF SOUTH CAROLINA

[Title omitted]

ORDER DISSOLVING INJUNCTION, ETC.

This matter came before the Chief Justice of this Court on or about the 24th day of April, 1933, upon application of the defendants to have an appeal to the United States Supreme Court allowed, and a cost bond and supersedeas bond fixed therein as provided by law.

For the reasons stated in his said order dated the 24th day of April, 1933, the Chief Justice of this Court fixed the appeal bond at Five Hundred ($500.00) Dollars and the supersedeas bond at Eighty-five Thousand ($85,000.00) Dollars, the amount of the latter bond being intended to provide security for the payment of the license fees and

taxes by the Class "F" Carriers affected by the said suit.

It now appears to the Court that the said defendant, M. D. Hicklin, individually and as a representative of Class "F" Carriers, has furnished the Five Hundred ($500.00) Dollar bond herein provided for, but there is no intention on the part of the defendant-appellant either individually or as a representative of Class "F" Carriers to put up the Eighty-five Thousand ($85,000.00) Dollar supersedeas bond provided for by the said order.

Under these circumstances and in view of the pendency of the suit in this Court and the appeal to the United States Supreme Court, and in view of the pendency of the suit brought by M. D. Hicklin, individually, and as a representative of Class "F" Carriers, in the United States District Court against the petitioners in this case, it appears to the Court that a method should be provided whereby the State of South Carolina may be in position to collect the taxes and license fees due by the said Class "F" Carriers pending the said appeal to the United States Supreme Court, but that any members of the said Class "F" Carriers operating in the State of South Carolina should be able to participate in the appeal to the United States Supreme Court by putting up the amount of the license fees and taxes which they would otherwise be required to pay for operating over the State Highways. There appears to be no provision in the statutory law of the State of South Carolina whereby such Class "F" Carriers would have the right to pay the amount of such taxes and fees under protest with the right to recover them back.

For the foregoing reasons, and upon the Court's own motion, and by and with the consent of the counsel for the petitioners in the above case and counsel for the defendant,

It is hereby ordered and adjudged:

1. That the injunction heretofore issued by this Court restraining the enforcement of the statutes involved in this case be and the same is hereby dissolved, and that the peti- [fol. 46] tioners have leave to collect the license fees and taxes from the Class "F" Carriers as provided by law, or to secure a further order from this Court enjoining and restraining any of the said Class "F" Carriers from operating over the highways of this State, with the right to have any violation of such order punished by contempt or otherwise as provided by law, after having copy of the said order

duly served upon any of the Class "F" Carriers; provided, however, that if any such Class "F", or contract, carrier, may desire to participate in the relief which may be afforded should the said M. D. Hicklin prevail in his appeal, and make himself a party thereto, he may pay such license fees and taxes to the State Treasurer, in escrow, to be held by said Treasurer abiding the result of said appeal, then to be paid over by the said Treasurer to the Railroad Commission, or returned to such parties, as the case may be without interest; provided, however, that the said Treasurer shall not be authorized to accept any such payments until any such carrier shall submit to him a statement from the Railroad Commission as to the amount due by any such carrier by way of such license fees and taxes, and a statement from counsel of record for the said M. D. Hicklin that such carrier has contributed ratably to the costs of said appeal.

Eugene S. Blease, Chief Justice.

We Concur:

John G. Stabler, M. L. Bonham.

13 May, 1933.

[fol. 47] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 48] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND STIPULATION AS TO PRINTING RECORD—Filed May 24, 1933

Comes now the appellant in above entitled cause and states that the points upon which he intends to rely in this Court are as follows:

Point 1. The statute of the State of South Carolina, to wit: Act No. 170 of 1925, entitled "An Act Providing for the Regulation, Supervision, and Control of Persons, Firms, Corporations, and Associations Owning, Controlling, Operating or Managing Motor Vehicles Used in the Business of Transporting Persons of Property for Compensation on the Improved Public Highways of the State, Which Are, or May Hereafter be Declared to be Parts of

the State Highway System, or Any of the County Highway Systems, or the Streets of Any City or Town, and Prescribing and Imposing License Fees and Providing for the Disposition of the Revenue Raised by the Same", approved April 8, 1925 (XXXIV Statutes at Large, 252), as amended by Act No. 663 of 1928, approved March 9, 1928 (XXXV Statutes at Large, 1238), Act No. 220 of 1929, approved March 4, 1929 (XXXVI Statutes at Large, 247), Act. No. 716 of 1930, approved March 7, 1930 (XXXVI Statutes at Large, 1100), Act No. 604 of 1930, approved April 7, 1930 (XXXVI Statutes at Large, 1068), Act No. 792 of 1930, approved April 7, 1930 (XXXVI Statutes at Large, 1327), and Act No. 109 of 1931, approved March 18, 1931 (XXXVII Statutes at Large, 144), now appearing, as so amended, as Chapter 162 (Sections 8507-8524) of the Code of Laws of South Carolina, 1932, Vol. III, 954, is unconstitutional and repugnant to Section 1 of the Four-[fol. 49] teenth Amendment to the Constitution of the United States, in that it deprives the appellant of his liberty and property without due process of law.

Point 2. The aforesaid Act of the State of South Carolina is unconstitutional and repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it denies the appellant the equal protection of the laws.

Point 3. The aforesaid Act of the State of South Carolina is unconstitutional and repugnant to Section 8 of Article 1 of the Constitution of the United States, in that it imposes an undue burden on interstate commerce.

Point 4. That Section 66 of Act No. 291 of 1931, approved May 9, 1931 (XXXVII Statutes at Large, 397—see page 454) is unconstitutional and repugnant to Section 1 of the Fourteenth Amendment to, and Section 8 of Article 1 of, the Constitution of the United States, (a) in that said appellant was not "subject to regulation by the Railroad Commission" for the reasons stated in Points 1 and 2, (b) in that the tax imposed by the terms of said Act upon the "gross receipts" was a tax upon his receipts from interstate as well as intrastate business, and (c) in that said tax was not in lieu of all other taxes.

Point 5. That Section 34 of Act No. 897 of 1932, approved April 4, 1932 (XXXVII Statutes at Large, 1567—

see page 1606) is unconstitutional and repugnant to the constitutional provisions referred to in Point 4 for the reasons stated under (a) and (c).

Point 6. The Supreme Court of the State of South Carolina erred in ruling that the aforesaid statutes of South Carolina were valid and constitutional regulations.

B. Wofford Wait, Counsel for Appellant.

We, John M. Daniel, Attorney General of the State of South Carolina, and Irvine F. Belser, Special Counsel of the Railroad Commission of South Carolina, attorneys of record for the Appellees, hereby acknowledge due and timely service of the above statement of points to be relied upon, and agree that this statement, together with the parts [fols. 50–53] of the record mentioned and referred to in the Stipulation of counsel, dated May 22, 1933, constitute all parts of the record material and necessary to the consideration of the case, and hereby expressly waive all right to file a counterdesignation of parts of the record to be printed.

John M. Daniel, Attorney General of South Carolina; Irvine F. Belser, Special Counsel for Railroad Commission of South Carolina, Counsel for Appellees.

Dated at Columbia, S. C., May 23, 1933.

[fol. 54] STIPULATION OF COUNSEL AS TO CONTENTS OF RECORD

It is hereby stipulated and agreed by and between counsel for the appellant and counsel for the appellees in above entitled cause that only the following parts of the record, as filed in this court, need be printed by the Clerk for the hearing of this case, and that the same may be printed under one cover:

1. Order of Mr. Justice John G. Stabler, dated August, 1932.
2. Petition, dated August 3, 1932.
3. Return and Answer, dated August 22, 1932.
4. Reply, dated October 5, 1932.

5. Affidavit of W. W. Goodman, dated Dec. 16, 1931.
6. Decree of Supreme Court of South Carolina, filed Jan. 27, 1933.
7. Petition for Appeal.
8. Assignments of Error.
9. Statement as to Jurisdiction of Court.
10. Order Allowing Appeal.
10½. Order as to Bond, dated May 13, 1933.
11. Waiver of Issuance of Citation and Acknowledgment of Service, dated May 22, 1933.
12. This Stipulation.

B. Wofford Wait, Counsel for Appellant. John M. [fols. 55 & 56] Daniel, Irvine F. Belser, Counsel for Appellees.

Columbia, S. C., May 22, 1933.

[fol. 57] [File endorsement omitted.]

Endorsed on cover: File No. 37,696. South Carolina Supreme Court. Term No. 94. M. D. Hicklin, individually, etc., and Blalock Motor Express, Inc., appellants, vs. J. C. Coney, Earle R. Ellerbe, Sam C. Blease, et al., etc. Filed May 24, 1933. File No. 94, O. T., 1933.